

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TONY B. GASKINS,
Plaintiff,

v.

CIVIL ACTION NO.
05-10858-GAO

CARL SINGLETARY, Doctor;
STANLEY GALAS, Nurse Practitioner;
SUSAN J. MARTIN; DAVID NOLAN,
Superintendent; and LISA MITCHELL,
Deputy Superintendent,
Defendants.

**REPORT AND RECOMMENDATION RE:
DEFENDANT NOLAN AND MARTIN'S MOTION TO DISMISS AND/OR
MOTION FOR SUMMARY JUDGMENT (DOCKET ENTRY # 15); PLAINTIFF'S
MOTION TO STAY PROCEEDINGS ON DEFENDANTS MOTION TO DISMISS
AND/OR MOTION FOR SUMMARY JUDGMENT, AND TO PERMIT DISCOVERY
BY PLAINTIFF (DOCKET ENTRY # 19); DEFENDANTS STANLEY GALAS
AND CARL SINGLETARY, M.D.'S MOTION FOR SUMMARY JUDGMENT
(DOCKET ENTRY # 32)**

July 31, 2006

BOWLER, U.S.M.J.

Pending before this court are two summary judgment motions (Docket Entry ## 15 & 32) in this civil rights action under 42 U.S.C. § 1983 ("section 1983") filed by plaintiff Tony B. Gaskins ("Gaskins"), an inmate housed at the Massachusetts Correctional Institute in South Walpole, Massachusetts ("MCI-Cedar Junction").

The amended complaint alleges that defendants Susan J. Martin ("Martin"), Director of Health Services for the Department of Correction, David Nolan ("Nolan"), Superintendent of MCI-Cedar Junction, Lisa Mitchell ("Mitchell"), Deputy Superintendent of MCI-Cedar Junction, Carl Singletary, M.D. ("Dr. Singletary"),

Medical Director at MCI-Cedar Junction during the relevant time period, and Stanley Galas ("Galas"), a nurse practitioner employed by University of Massachusetts Correctional Health Services ("UMCH") as the Health Services Administrator at MCI-Cedar Junction, were deliberately indifferent to Gaskins' medical needs following shoulder surgery in contravention of the Eighth Amendment. In particular, Gaskins complains about the delay in receiving physical therapy and, once provided, the inadequate number of sessions.¹ Because of inadequate post surgical care, Gaskins submits that he is in constant pain, making it difficult to sleep, and suffers from limited mobility in his right arm and the loss of a large amount of muscle mass. (Docket Entry # 9).

Nolan, Mitchell and Martin move for summary judgment² on the

¹ For example, at various points in the opposition as well as in the amended complaint, Gaskins asserts that Nolan, Mitchell and Martin were deliberately indifferent "due to the long delay it took after surgery to begin physical therapy." (Docket Entry # 41, p. 6). Once therapy began, Gaskins asserts that "it only occurred once every two to three weeks in complete contrast to doctors orders." (Docket Entry # 41, p. 8). The five counts in the amended complaint uniformly allege Eighth Amendment violations separately against each defendant based upon the delay in not immediately receiving the physical therapy or the failure to provide "proper and timely" post surgery care. (Docket Entry # 9).

² Nolan, Mitchell and Martin style their motion as a motion to dismiss and/or for summary judgment. In support thereof, they filed an affidavit and relevant medical records. In reply, Gaskins opposed the motion by filing *inter alia* an affidavit. Given the absence of unfair surprise, the motion is properly treated as one for summary judgment. See, e.g., Condon v. Local 2944, United Steelworkers of America AFL-CIO, CLC, 683 F.2d 590, 593-94 (1st Cir. 1982) (allowing motion for summary judgment without notice where motion titled "motion to dismiss or, in the

basis that they were not deliberately indifferent to Gaskins' medical needs and they were not personally involved in any constitutional violation. They additionally submit that supervisory liability is absent and assert an entitlement to qualified immunity. (Docket Entry # 15). Dr. Singletary and Galas seek summary judgment on the basis that they were not deliberately indifferent within the meaning of the Eighth Amendment. (Docket Entry # 32).

Viewing the record in Gaskins' favor, who is also proceeding pro se and therefore entitled to a liberal construction of the pleadings, the record shows the following.

FACTUAL BACKGROUND

On December 8, 2004, Gaskins, then 37 years old, underwent arthroscopic surgery on his right shoulder to alleviate shoulder pain at Lemuel Shattuck Hospital Correctional Unit ("LSH") in Jamaica Plain, Massachusetts. During the one to two year period prior to surgery, Gaskins received three cortisone injections, physical therapy and non-steroidal anti-inflammatory medications ("NSAIDS"). He had experienced chronic right shoulder pain with little relief from the cortisone injections. An x-ray taken on November 22, 2004, revealed no space at the "AC joint." After an orthopedic consultation that same day at LSH, the decision to

alternative, for summary judgment," accompanied by lengthy memorandum and affidavit).

operate was made given the diagnosis of an impingement syndrome and a mass in the right shoulder. Dr. Singletary initialed the LSH consultation report prior to the surgery.

Adriana Carrillo, M.D. ("Dr. Carrillo"), an orthopedic surgeon at LSH, performed the operation which proceeded without incident and included the removal of the mass and a distal clavicle resection. The pathology report the same day confirmed the presence of degenerative joint disease and tissue consistent with lipoma.

Dr. Carrillo discharged Gaskins from LSH the same day with instructions to maintain the right shoulder in a sling and keep the dressing dry. She also ordered "Tylenol #3" with codeine for three days, Naprosyn at a 500 milligram dose and the removal of the surgical staples in ten days. Gaskins, however, only took the Tylenol for the next 24 hours.

Upon arriving at MCI-Cedar Junction, Gaskins spent the night at the facility's Health Services Unit ("HSU") where he remained until the afternoon of December 9, 2004. The dressing remained clean and dry. On December 9th, Gaskins reported that his arm was "'throbbing' a little" but that he felt "okay." (Docket Entry # 41, Attached Records). Upon discharge that afternoon, Gaskins returned to his unit. At that time, Gaskins "was housed in 10 Block segregation on awaiting action status." (Docket Entry # 40).

On December 13, 2004, Gaskins returned to HSU. His dressing

was changed, the area cleaned and the staples noted as intact. Gaskins reported "mild discomfort." (Docket Entry # 41, Attached Records). He received additional medical attention at HSU the following day whereupon his dressing was changed and the area cleaned. Medical records reflect that he only reported an itching sensation in the anterior section of the staples.

He did, however, complain to both Nolan, Mitchell and unidentified "medical staff" about his need for "better pain medication." (Docket Entry # 40). Gaskins' sister then telephoned Mitchell and demanded that Gaskins receive "proper medical attention." Id.

Having complained to Mitchell, Nolan and his sister, Gaskins was again seen at HSU by a nurse practitioner on December 15, 2004. Progress notes reflect "that he felt his pain was being poorly controlled." (Docket Entry # 41, Attached Records). Upon examining Gaskins, the nurse practitioner reported that the staples and incision remained intact and the dressing dry. She further noted a full range of motion in "hand/fingers" albeit with "minor finger edema." Id. Notably, the nurse added Motrin at a 600 milligram dose to the list of approved medications, discontinued Naprosyn, continued APAP³ and also approved Ultram for a five day period. Gaskins discontinued the Ultram after one day due to nausea and described the Motrin as "ineffective."

³ Although not defined in the record, APAP is a brand name for the analgesic Acetaminophen. See www.rxlist.com.

(Docket Entry # 40). On a scale of one to ten, with ten being the greatest level of pain, Gaskins reported that, at its worse, the pain was a level six.

Gaskins received additional medical attention the next day again at HSU. His dressing was changed and the area surrounding the staples cleaned. There was no sign of infection and Gaskins did not voice any complaint. The shoulder remained in a sling. On December 17, 2004, Dr. Singleton approved an extension of the medical order not to handcuff Gaskins' right arm.

Gaskins returned to HSU on December 18, 2004. He declined to have the staples removed, however, preferring instead to have a physician perform the procedure. Progress notes describe the shoulder as "healing well." Id. The area around the shoulder was cleaned and the dressing changed on both the December 19 and 20, 2005 visits to HSU. At the December 20th visit, Gaskins refused pain medication.

On December 27, 2004, Gaskins returned to LSH for a two week post surgery follow up appointment. Staples were removed. His range of motion was described as limited and he reported experiencing pain. The LSH consultant instructed Gaskins to avoid lifting more than five pounds and extending his arm. Significantly, the consultant also instructed Gaskins in pendulum exercises. Dr. Singletary's stamped signature dated January 6, 2005, appears on the consultation form.

Gaskins returned to LSH for a follow up appointment on

January 10, 2005. Dr. Carrillo examined Gaskins and noted that the surgical wounds were "healing well" with "minimal edema." (Docket Entry # 16, Ex. 1, Pt. 2). Gaskins reported "a lot of pain in the right shoulder" and that he had "been doing the pendulum exercises." Id. It is during this visit that Dr. Carrillo placed the initial order for occupational therapy.⁴ The order, which Gaskins repeatedly emphasizes,⁵ reads as follows:

Patient has very decreased ROM, he need[s] to start OT for ROM and strengthening of the right shoulder, 2 times a week for 4 weeks, continue codman exercises, he was given also some exercises and a theroband[.] If ROM does not improved[sic] and pain does not decreased[sic] by next follow up visit he may need MUA.

Id. Dr. Carrillo did not prescribe pain medications. She did, however, note the need for a follow up appointment in four weeks and prohibited handcuffing of Gaskins' right arm.

That same day, Gaskin received occupational therapy at LSH. The therapist instructed Gaskins in range of motion and strengthening exercises which Gaskins demonstrated the ability to perform. The strengthening exercises included isometric

⁴ Gaskins attests that Dr. Carrillo informed Gaskins it was time for him to begin physical therapy and that she would schedule sessions so that he could work with weights. Although the isometric exercises would increase his range of motion, she advised him that it was important to work with weights to build back the muscle strength lost as a result of the surgery. The foregoing information is not contained in Dr. Carrillo's consultation report.

⁵ Gaskins bases his claim of a delay in receiving physical therapy primarily upon this order as well as a March 10, 2005 order.

exercises as well as exercises performed with a Theraband. Although provided with a Theraband, a sergeant confiscated the band for security reasons when Gaskins returned to MCI-Cedar Junction.

On January 18, 2005, Dr. Singletary initialed a stamped signature of his name on both Dr. Carrillo's report containing the order and the January 10th occupational therapy progress note containing the foregoing information regarding the strengthening exercises and prescribed occupational therapy. Dr. Singletary therefore knew about the January 10th prescribed occupational therapy. He also knew that Gaskins had already received occupational therapy at LSH, including instruction in strengthening exercises, that same day and had "demonstrated [an] ability to do all exercises," including "strengthening exercises."⁶ (Docket Entry # 16, Ex. 1, Pt. 2). Dr. Singletary also initialed and approved a consultation request on January 18, 2005, allowing Gaskins to have an orthopedic follow up appointment at LSH on March 10, 2005. Like the LSH occupational therapy progress note, the consultation request notes Gaskins'

⁶ The January 10th occupational therapy progress note initialed by Dr. Singletary reads, in full, as follows:

Pt. was instructed in ROM and strengthening exercises. He demonstrated ability to do all exercises. Strengthening exercises included isometric and Theraband. He was given written instructions for all exercises and also given Theraband.

(Docket Entry # 16, Ex. 1, Pt. 2).

referral to occupational therapy.⁷

Relatively little took place in the context of Gaskins' care from January 19th to the March 10th follow up appointment at LSH.⁸ On February 15, 2005, Dr. Singletary approved extending the existing medical restriction prohibiting handcuffing Gaskins' right shoulder until March 10, 2005. The record fails to reflect that Gaskins completed a sick call form requesting the physical therapy, filed a grievance regarding the lack of physical therapy or otherwise brought the failure to follow through with the prescribed physical therapy to the attention of any defendant during this time period.⁹ At most, Gaskins complained to unidentified "medical staff" at unidentified time periods about the confiscation of the Theraband "and nobody did anything." (Docket Entry # 40).¹⁰

⁷ A consultation request specifically requesting physical therapy, however, was not prepared by a nurse practitioner until March 24, 2005. Dr. Singletary approved that request on March 29, 2005.

⁸ Gaskins' post January 18, 2005 grievance forms and sick call requests date from March 10, 2005 forward.

⁹ Gaskins avers that, "Everytime I was seen by medical staff, I always complained about the pain I constantly endure." (Docket Entry # 40). The medical records, however, reflect that Gaskins was not seen by medical staff during the January 19th to March 9, 2005 time period.

¹⁰ In contrast to Gaskins' affidavit (Docket Entry # 40), which is signed under the pains and penalties of perjury, the amended "verified" complaint (Docket Entry # 9) is only "verified" as being "true and accurate" with no mention of being signed under the pains and penalties of perjury. See 28 U.S.C. § 1746; Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v.

At the March 10th follow up appointment, Mary Connolly ("Connolly"), a physician assistant,¹¹ described Gaskins as able to perform a full range of motion. His right shoulder, however, remained "very weak." (Docket Entry # 41, Attached Records). Connolly additionally noted the existence of muscle atrophy "at the supraspinatus area."¹² Id. In the consultation report, she warned that Gaskins:

needs Physical Therapy for muscle strengthening or he will injure another area as he attempts to compensate. I understand he is in segregation and cannot have the Theraband so please send in for therapy 2X week.

Id.

Galas responded to the physical therapy order within one week and Dr. Singletary responded within nine days. In particular, on March 17, 2005, Galas completed a referral form

Medfit International, Inc., 982 F.2d 686, 689-690 (1st Cir. 1993) (noting that pursuant to 28 U.S.C. § 1746 "an unsworn statement *signed under penalty of perjury* may be used, in lieu of a sworn statement or affidavit, to support or oppose a motion for summary judgment") (emphasis added). Statements therein about complaints made to Nolan and Mitchell at undetermined times (Docket Entry # 9, ¶ 17) are not in the proper form and therefore not part of the summary judgment record. See Kenda Corp., Inc. v. Pot O'Gold Money Leagues, 329 F.3d 216, 225 n. 7 (1st Cir. 2003) (finding that pro se plaintiff's failure to develop legal argument resulted in waiver inasmuch and citing case for principle that "[p]ro se status does not insulate a party from complying with procedural and substantive law").

¹¹ The LSH form reflecting the visit references the ordering physician as Dr. Carrillo.

¹² The supraspinatus is a "muscle originating above the spine of the scapula and inserted on the greater tubercle of the humerus." Blakiston's Gould Medical Dictionary (4th ed. 1979).

for the physical therapy. Consistent with Dr. Carrillo's and Connolly's opinion, Galas posited that Gaskins needed the therapy twice a week to increase muscle strength.

Upon returning to MCI-Cedar Junction from the March 10th LSH visit, Gaskins immediately filed a grievance with UMCH about not receiving the physical therapy. In the grievance, he alleged that, "Today I found out that my shoulder has 'No' muscle mass and that it can be permanently damaged because it did not receive the ordered physical therapy." (Docket Entry # 41, Attached Records). As the requested remedy, Gaskins asked for another order not to be handcuffed behind the back.¹³ Galas responded to the grievance by advising Gaskins that he needed to be assessed by a provider and was scheduled to see a provider the following week. On March 30, 2005, Dr. Singletary approved an extension of the order limiting restraints to waist chains only until June 29, 2005.

In conjunction with the March 10th grievance, a paralegal from the Massachusetts Correctional Legal Services office in Boston wrote a letter dated March 11, 2005, alerting Galas to the need to address Gaskins' lack of physical therapy. The letter was copied to Martin's attention. The paralegal noted that if Gaskins could not have the Theraband for security concerns then Galas should arrange an alternate physical therapy plan. By

¹³ The February 15, 2005 order was due to expire on March 10, 2005.

letter dated April 4, 2005, Galas replied that Gaskins was scheduled for physical therapy and HSU would continue to monitor and treat his condition. The reply letter was also copied to Martin.

On March 22, 2005, however, Gaskins "was transferred to the [Department Disciplinary Unit] due to behavioral problems." (Docket Entry # 36). On March 23, 2005, Gaskins completed one of several sick call requests asking "to be seen." (Docket Entry # 41, Attached Records). The request was received on March 27, 2005, and responded to inasmuch as a nurse practitioner examined Gaskins on March 29, 2005. The nurse practitioner noted some swelling and tenderness as well as a limited range of motion. More significantly, the nurse practitioner stated on the UMCH sick form that Gaskins reported that the Ultram helped with the pain and he denied needing other analgesics.

Two days later on March 25, 2005, Gaskins filed another grievance with UMCH again complaining about the lack of physical therapy and the development of scar tissue in his right shoulder. On March 29, 2005, Dr. Singletary approved a consultation request prepared by a nurse practitioner for an April 5, 2005 physical therapy appointment and an April 14, 2005 follow up orthopedic appointment. Also on March 29, 2005, Dr. Singletary initialed his stamped signature on Dr. Carrillo's March 10th consultation report, which at that point contained a March 25, 2005 handwritten notation stating that the physical therapy and follow

up orthopedic consultation appointments had been made.¹⁴ On March 29, 2005, another nurse practitioner prepared a similar consultation request for Gaskins to receive the physical therapy on April 5th off site at a specialty clinic.

Gaskins received a complete physical therapy evaluation on April 5, 2005. The therapist instructed Gaskins about various exercises, which Gaskins performed, and provided Gaskins with informational handouts. Upon examination, the therapist decided that Gaskins only needed therapy two to four times a month and scheduled a follow up appointment for April 25, 2005. The four week goal was to decrease pain and to increase range of motion. The therapist further noted that Gaskins was experiencing increased pain, decreased function and decreased range of motion. The therapist posited that Gaskins was "a good candidate for [physical thera[py]." (Docket Entry # 41, Attached Records).

On April 11, 2005, Gaskins filed another grievance with UMCH. He alleged therein that "physical therapy may not undo the damage already done" and, as a result, he would "be forever disabled." Id.

When Gaskins saw Connolly at LSH on April 14, 2005, she did not alter the decision made by the physical therapist for visits two to four times a month. Noting that Gaskins was receiving physical therapy, she described him as demonstrating "a good

¹⁴ The March 25th handwritten note reads as follows: "f/o for ortho + PT consult done."

understanding of exercises." (Docket Entry # 16, Ex. 1, Pt. 2). Rather than set a follow up appointment, she noted that Gaskins should return to the LSH clinic in two to three months if he still had complaints. Dr. Singletary initialed her consultation report on April 28, 2005.

Gaskins' second physical therapy visit took place as scheduled on April 25, 2005. Gaskins complained about his shoulder feeling stiff and painful. The therapist noted that Gaskins continued to feel pain with daily activities. In response, the therapist therefore advised Gaskins to avoid certain exercises including push ups, laterals, flies and bench presses. A follow up appointment was scheduled for May 13, 2005, and Dr. Singletary initialed the therapy notes on April 28, 2005.

On April 28, 2005, Gaskins submitted another sick call request. UMCH responded quickly and Dr. Singletary examined Gaskins six days later on May 4, 2005, at HSU. He decided to prescribe APAP for the pain and NSAIDS if Gaskins needed additional analgesics.

Gaskins returned for physical therapy on May 13, 2005. He described his shoulder as feeling "'stiff'" but hurting only "'a little.'" (Docket Entry # 16, Ex. 1; Docket Entry # 36). Gaskins performed various exercises. The therapist described Gaskins as "progressing well" with physical therapy and stated that the pain was not limiting his daily activities. (Docket Entry # 16, Ex. 1). On May 20, 2005, Dr. Singletary initialed

his stamped signature on the physical therapy progress notes.

On June 14, 2005, Gaskins had another physical therapy visit. When he reported doing push ups that resulted in increased pain, the therapist advised him not to perform such exercises and to perform only exercises prescribed by a physical therapist. During a June 29, 2005 physical therapy visit, Gaskins described his shoulder as "really sore." (Docket Entry # 36, Ex. 11). The therapist continued treating Gaskins with various exercises and scheduled a follow up appointment for July 14, 2005.¹⁵ Additional physical therapy visits took place on July 14 and August 2, 2005. Notations describe Gaskins as "progressing well" on July 14th and "'feeling pretty good'" on August 2nd even though his shoulder "'popped' this morning." Id. Gaskins "did not complain of pain." (Docket Entry # 36). On the August 2nd progress note, the therapist depicted Gaskins as "progressing well" and "making gains" in all areas. (Docket Entry # 36, Ex. 11). A follow up was scheduled for August 30, 2005. Dr. Singletary reviewed and initialed the therapy notes on August 11, 2005.

Gaskins complained of pain at the August 30th physical therapy visit but reported doing push ups with the pain. A follow up was scheduled for September 22, 2005, and Dr.

¹⁵ Dr. Singletary's initials appear on the therapy progress notes next to his stamped signature with the date of July 21, 2005.

Singletary initialed the progress notes on September 7, 2005.

DISCUSSION

Section 1983 provides a cause of action for the deprivation of an individual's constitutional rights by state actors.

Watterson v. Page, 987 F.2d 1, 7 (1st Cir. 1993) (section 1983 action requires the plaintiff to "show both the existence of a federal constitutional or statutory right, and some deprivation of that right as a result of defendants' actions under color of state law"). To succeed on a section 1983 claim, the plaintiff must show "(i) that the conduct complained of has been committed under color of state law, and (ii) that [the alleged] conduct worked a denial of rights secured by the Constitution or laws of the United States." Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 32 (1st Cir. 1996) (internal quotation marks omitted).

Defendants, who are all state actors, move for summary judgment contending there is an absence of a genuine issue of material fact that they violated the Eighth Amendment. Defendants are correct.

Under the Eighth Amendment, inadequate medical care claims are analyzed under a twofold framework laid out in Farmer v. Brennan, 511 U.S. 825, 834 (1994). See Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002). First, the deprivation of medical care must be "objectively, sufficiently serious." Farmer v. Brennan, 511 U.S. at 834; Burrell v. Hampshire County, 307

F.3d at 7. A sufficiently serious medical need "is one 'that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" Mahan v. Plymouth County House of Corrections, 64 F.3d 14, 18 (1st Cir. 1995) (quoting Gaudreault v. Municipality of Salem, Massachusetts, 923 F.2d 203, 208 (1st Cir. 1990)).

Gaskins meets this standard based on Dr. Carrillo's January 10, 2005 order that he needed to begin occupational therapy to increase his range of motion and strengthen his right shoulder. She prescribed such therapy two times a week for four weeks. The March 10, 2005 orthopedic consultation report repeated and reinforced that Gaskins required physical therapy two times a week.

Under the second prong of an Eighth Amendment inadequate medical care claim "the plaintiff must show that prison officials possessed a sufficiently culpable state of mind, namely one of deliberate indifference to an inmate's health." Burrell v. Hampshire County, 307 F.3d at 7. State of mind issues such as "deliberate indifference usually present[] a jury question." Torraco v. Maloney, 923 F.2d 231, 234 (1st Cir. 1991).

Deliberate indifference is more than mere negligence. Burrell v. Hampshire County, 307 F.3d at 7. Accordingly, an inadvertent failure to provide medical care such as post surgery therapy is not actionable even if negligent. Layne v. Vinzant,

657 F.2d 468, 471 & 474 (1st Cir. 1981) (Eighth Amendment denial of medical care based on lack of physiotherapy).

Rather, the required mental state is "akin to criminal recklessness." Surprenant v. Rivas, 424 F.3d 5, 19 (1st Cir. 2005). Deliberate indifference is "a form of scienter in which the official culpably ignores or turns away from what is otherwise apparent." Alsina-Ortiz v. LaBoy, 400 F.3d 77, 82 (1st Cir. 2005) (denial of medical care based upon pattern of failure to report and refer inmates to health providers). Although more blameworthy than negligence, the standard "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d 60, 64 (1st Cir. 2002).

The "deliberate" part of the deliberate indifference inquiry requires an actual subjective awareness of the risk." Burrell v. Hampshire County, 307 F.3d at 8. The official must be both aware of the "'facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" Id. at 8 (quoting Farmer v. Brennan, 511 U.S. at 837; emphasis added). An official is not liable unless he "knows of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. at 837.

Plaintiff asserts that defendants all knew about his need for physical therapy and the substantial risk he purportedly

faced if not given the physical therapy in a timely manner. Aware of the risk, defendants deliberately ignored the physical therapy order, according to Gaskins.

Here, as in Mahan where the corrections officers knew of the prescription for the anti-depressant and anti-seizure medication with Mahan's name delivered to the corrections facility, Dr. Singletary knew of the prescription for physical therapy. See Mahan v. Plymouth County House of Corrections, 64 F.3d at 18 (one component of the subjective awareness requirement satisfied where officials "were well aware that Tegretol had been prescribed for Mahan, and that he repeatedly requested it"). On January 18, 2005, Dr. Singletary initialed the March 10, 2005 LSH orthopedic consultation report. Accordingly, for purposes of summary judgment, as of January 18, 2005, Dr. Singletary had actual knowledge that Gaskins needed physical therapy.

The evidence further shows, however, that Dr. Singletary knew that Gaskins had already been given a Theraband on March 10, 2005, and instructed in range of motion and strengthening exercises at the March 10, 2005 LSH occupational therapy appointment. Dr. Singletary also knew that Gaskins had demonstrated an ability to perform all of the exercises. Thus, even assuming that Dr. Singletary had actual knowledge of the Theraband's confiscation,¹⁶ he did not have actual knowledge that

¹⁶ The evidence supporting this assertion rests entirely on Gaskins' affidavit statement that he "complained to every medical

Gaskins was not performing the range of motion and strengthening exercises or that Gaskins needed a referral to perform the physical therapy.

During the critical time between January 19, 2005, the day after Dr. Singletary initialed the January 10th LSH orthopedic consultation report and the occupational therapy progress note, and March 10, 2005, when Gaskins complained about not receiving the ordered physical therapy in an inmate grievance, there is insufficient evidence to demonstrate that any defendant, including Dr. Singletary and Galas, had actual knowledge that Gaskins needed his or her intervention in order to receive the prescribed physical therapy exercises and that if Gaskins did not receive such physical therapy immediately that he faced a substantial risk of serious harm. See, e.g., Mahan v. Plymouth County House of Corrections, 64 F.3d at 18 (record "contains no evidence from which a rational factfinder could conclude that PHC personnel were informed, or otherwise learned, of the serious symptoms Mahan actually experienced while detained, such as would have made them subjectively aware of a condition requiring their intervention prior to November 21").

This is not a situation where Dr. Singletary, Galas or any other defendant "ignored a clear warning that the medical treatment they provided" for Gaskins "was inadequate." Cf.

staff about its confiscation and nobody did anything." (Docket Entry # 40, ¶ 18).

Miranda v. Munoz, 770 F.2d 255, 259 (1st Cir. 1985) (upholding denial of motion for judgment notwithstanding verdict where "[i]t could be found that defendants ignored a clear warning that the medical treatment they provided for Rosario Cristobal was inadequate, allowing him to deteriorate beyond recovery"). The January 10, 2005 LSH orthopedic consultation report states only that Gaskins needs to start occupational therapy for range of motion and for strengthening his right shoulder two times a week for four weeks and that he was given exercises and a Theraband. The January 10, 2005 LSH occupational therapy progress notes show that Gaskins was given written instructions for all of the exercises and was also given a Theraband. There is little, if any, evidence to show that defendants knew that a Theraband (or a referral to physical therapy) was required to perform the exercises to avert a substantial risk of serious harm.

During this time period, no defendant affirmatively refused or repeatedly denied a physical therapy referral. Cf. Gill v. Mooney, 824 F.2d 192, 195-196 (2nd Cir. 1987) (deliberate refusal to provide inmate access to prescribed exercise program "on two separate occasions" coupled with attempt "to discontinue and rescind the doctor's order" survived Fed. R. Civ. P. 12(b)(6) dismissal).¹⁷ Indeed, when Gaskins drew attention to the lack of

¹⁷ The decision in Gill, cited repeatedly by Gaskins, is distinguishable for a number of reasons. First, although the Second Circuit decision notes that, "Prison officials are more than merely negligent if they deliberately defy the express

physical therapy with the March 10, 2005 grievance and when Connolly, in a more direct and explicit manner than Dr. Carrillo, instructed to "send [Gaskins] in for therapy 2X/week" if he "cannot have the Theraband," Galas, Dr. Singletary and other medical personnel responded promptly with a referral to physical therapy on March 17, 2005, and a number of consultation requests to receive physical therapy dated March 24 and 29, 2005.

This leads to the second defect in Gaskins' Eighth Amendment claims, i.e., the lack of an adequate showing of "indifference" on the part of any defendant sufficient to withstand summary judgment. First, where, as here, defendants are unaware of the substantial risk posed to Gaskins by the confiscation of the

instructions of a prisoner's doctors," the case involved far more deliberate and repetitive conduct than the conduct exhibited by defendants in the case at bar. In addition, immediately after the foregoing language, the court qualified the statement by stating that, "If defendants deliberately interfered with Gill's medically prescribed treatment solely for the purpose of causing him unnecessary pain, they may be subject to liability despite the likelihood that he suffered no permanent injuries." Gill v. Mooney, 824 F.2d at 196.

Second, as exemplified by the latter language, the First Circuit interprets Gill as stating a claim for relief where defendants defy a doctor's orders "solely for [the] purpose of causing [the] prisoner unnecessary pain," DesRosiers v. Moran, 949 F.2d 15, 20 (1st Cir. 1991) (paraphrasing Gill), a circumstance absent in the case at bar. The Theraband was confiscated for security reasons and the March 22, 2005 transfer to DDU was the result of behavioral problems. Third, Gill involved the more lenient Rule 12(b)(6) standard of review as opposed to the less forgiving summary judgment standard. See Burrell v. Hampshire County, 307 F.3d at 9 (distinguishing an Eighth Amendment case on the basis, in part, that it "was evaluated under the more lenient standard for dismissal of claims under Rule 12(b)(6), not as a summary judgment issue").

Theraband or the substantial risk posed by their failure to affirmatively refer Gaskins to physical therapy or make alternative arrangements, they cannot be considered "indifferent." Burrell v. Hampshire County, 307 F.3d at 8 ("[p]rison officials cannot be indifferent, of course, if they are unaware of the risk").

Second, defendants, notably Dr. Singletary and Galas, responded reasonably. See Burrell v. Hampshire County, 307 F.3d at 8 (prison officials "cannot be deliberately indifferent if they responded reasonably to the risk, even if the harm ultimately was not avoided"). Dr. Singletary knew that Gaskins had demonstrated an ability to perform physical therapy exercises and had been given written instructions notwithstanding the confiscation of the Theraband for security concerns. Dr. Singletary approved the follow up appointment at LSH for March 10, 2005, and also extended the existing prohibition against handcuffing Gaskins until the March 10, 2005 return visit. Gaskins' demonstrated knowledge in performing all exercises as well as his receipt of written instructions assured Dr. Singletary that Gaskins' medical care was not wholly devoid of therapy during this time period.¹⁸

In addition, Gaskins received a complete physical therapy

¹⁸ Gaskins' November 2005 affidavit avers that the physical therapist gave him a chart to perform the isometric exercises in his cell.

evaluation on April 5, 2005. At that time, the therapist determined that Gaskins only required physical therapy two to four times a month. At the April 14, 2005 follow up appointment with Connolly at LSH, she did not prescribe additional therapy sessions. To the contrary, she described Gaskins as receiving physical therapy and demonstrating a good understanding of the exercises. Given this latest order for physical therapy only two to four times a month, an order that was not contradicted by Connolly on April 14th or thereafter, Dr. Singletary, as well as other defendants, responded reasonably to the risk by deferring to the therapist and not ordering additional sessions two times a week.¹⁹ Nothing in the physical therapy progress notes of April 25, May 13, June 14 and 29, July 14 and August 2 and 30, 2005, initialed by Dr. Singletary revealed a need to schedule more frequent sessions. Accordingly, there is an insufficient showing for summary judgment purposes that defendants were subjectively aware of an excessive risk to Gaskins' health posed by the less frequent physical therapy sessions.²⁰ See generally Calderon-Ortiz v. Laboy-Alvarado, 300 F.3d at 64 (deliberate indifference

¹⁹ On April 25, 2005, Dr. Singletary initialed the physical therapy evaluation notes and therefore knew about the therapist's order to treat Gaskins with therapy only two to four times a month.

²⁰ Gaskins argues that "when the time came for the plaintiff to begin his physical therapy sessions, it only occurred once every two to three weeks in complete contrast to the doctors orders." (Docket Entry # 41, p. 8).

exists "only if the official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference'").

An examination of cases involving Eighth Amendment inmate claims to prescribed physical therapy confirms that summary judgment is appropriate. The therapy session provided Gaskins at LSH on January 10, 2005, including the exercises and written instructions, as well as the brief delay between January 18, 2005, when Dr. Singletary first viewed the January 10, 2005 LSH consultation report with the prescribed therapy, and the March 2005 physical therapy referral and consultation requests belies the existence of any deliberate indifference on the part of Dr. Singletary or any other defendant. See Hernandez v. Keane, 341 F.3d 137, 143, 145-146 (2nd Cir. 2003) (Eighth Amendment claim based upon alleged failure to ensure that inmate received prescribed physical therapy following hand surgery amounted to "no more than mere medical practice (if that)" inasmuch as inmate received some physical therapy for his leg, albeit not his hand, and "was given instructions by several doctors on how to perform the necessary therapy on his own hand"), cert. denied, 543 U.S. 1093 (2005); Shell v. Brzeniak, 365 F.Supp.2d 362, 379 (W.D.N.Y. 2005) (denying leave to amend complaint given futility of Eighth Amendment claim alleging, in part, that inmate "was overdue for

physical therapy"); Hanson v. Kaplan, 2005 WL 2209419 at * 5 (E.D. Wis. Sept. 12, 2005) (allowing summary judgment on Eighth Amendment claim alleging nine month delay in inmate receiving physical therapy after back surgery); Beedle v. Demasi, 2005 WL 1345341 at * 3 (E.D.Mich. June 3, 2005) (medical director's "approval of payment for one physical therapy session per week for three weeks rather than the recommended course of therapy of three sessions per week for two months does not rise to the level of an Eighth Amendment violation").

To the extent Gaskins raises additional Eighth Amendment medical care claims, such as the improper removal of the staples or the management of post surgery pain medications, they are unavailing. Neither Dr. Singletary, Galas nor any other defendant more tangentially involved in Gaskins' care acted in either a deliberate or indifferent manner. The staples were removed without incident by a physician as requested by Gaskins. Defendants were not deliberately indifferent to Gaskins' pain. To the contrary, Gaskins received a number of different pain medications which were adjusted at various times to accommodate his condition. See, e.g., Mahan v. Plymouth County House of Corrections, 64 F.3d at 18 (affirming directed verdict for alleged withholding of prescribed medication).

Separate and apart from the above basis for summary judgment, brevis disposition for Nolan, Mitchell and Martin is appropriate given their lack of involvement in Gaskins' care as

well as Martin's lack of deliberate indifference. At most, Martin received a copy of the March 11, 2005 letter to Galas from the Massachusetts Correctional Legal Services paralegal. She also received the April 4, 2005, letter, however, stating that Gaskins was scheduled for physical therapy and that HSU would continue to monitor his treatment. Martin therefore was not aware of facts from which she could or did infer that Gaskins faced a substantial risk of serious harm. Given the relatively prompt response by Galas to the letter and the indication therein that Gaskins was scheduled for therapy, Martin was not indifferent to Gaskins' need for physical therapy.

The only other basis for Nolan, Mitchell and Martin's liability is upon their conduct as supervisors in the delivery of medical care to MCI-Cedar Junction inmates such as Gaskins. Supervisory liability, however, is entirely absent. First, because neither Dr. Singletary nor Galas acted with deliberate indifference, neither Nolan, Mitchell nor Martin can be held liable under section 1983. See Wilson v. Town of Mendon, 294 F.3d 1, 6-7 (1st Cir. 2002) (if the officer "inflicted no constitutional harm, neither the municipality nor the supervisor can be held liable"); accord Torres-Viera v. Laboy-Alvarado, 311 F.3d 105, 108 (1st Cir. 2002) ("failure to state any Eighth Amendment claim whatsoever dooms [the plaintiff's] supervisory claim"); Martinez v. Colon, 54 F.3d 980, 990 (1st Cir. 1995).

Second, a supervisory official's liability for the behavior

of his subordinate officers exists "where his 'action or inaction is affirmatively linked to that behavior in the sense that it could be characterized as "supervisory encouragement, condonation or acquiescence" or "gross negligence amounting to deliberate indifference.'"'" Wilson v. Town of Mendon, 294 F.3d at 6 (internal brackets and ellipses omitted); accord Schmitt v. Mulvey, 2006 WL 516755 at * 3 (D.Mass. March 1, 2006) ("supervisory official's liability must stem from his or her own actions or omissions, which must be "affirmatively connect[ed] to the subordinate's violative act or omission," and which must themselves rise to the level of deliberate indifference'"). Simply put, the receipt by a prison supervisor such as Martin of "letters without responding does not rise to this level." Schmitt v. Mulvey, 2006 WL 516755 at * 3 (D.Mass. March 1, 2006).

Gaskins also sues all defendants in both their official and individual capacities. A section 1983 "damages suit against an official in an official capacity is tantamount to a suit against the entity of which the official is an agent (the jail)." Burrell v. Hampshire County, 307 F.3d at 7; see Hafer v. Melo, 502 U.S. 21, 25 (1991) ("[b]ecause the real party in interest in an official-capacity suit is the governmental entity and not the named official, 'the entity's "policy or custom" must have played a part in the violation of federal law'"). As was the case in Burrell v. Hampshire County, 307 F.3d at 7 (dismissing official capacity claim against jail because the entity did not follow "a

policy or custom of deliberate indifference"), there is no evidence to support a claim that the Department of Correction,²¹ MCI-Cedar Junction or UMCH followed "a policy or custom of deliberate indifference" in the context of an inmate's need for physical therapy or pain medications following surgery.

As a final matter, on August 5, 2005, Gaskins filed a motion to stay under Rule 56(f), Fed. R. Civ. P. ("Rule 56(f)") (Docket Entry # 19) a ruling on the summary judgment motion filed by Nolan, Mitchell and Martin (Docket Entry # 15) until these defendants responded to Gaskins' request for documents, then being drafted, and the court made a ruling on the motion to amend the complaint. In September 2005, shortly after Gaskins filed the motion, however, the court made a ruling on the motion to amend. (Docket Entry # 22).

Moreover, after filing the motion to stay, Gaskins managed to provide this court with all the necessary documents to properly evaluate Nolan, Mitchell and Martin's summary judgment motion. See generally Filiatrault v. Converse Technology, Inc., 275 F.3d 131, 138 (1st Cir. 2001). He also fully responded to the merits of the motion. See Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 23 (1st Cir. 1999) ("[o]rdinarily, a party 'may not attempt to meet a summary judgment challenge head-on but fall back on Rule 56(f) if its first effort is

²¹ As Health Services Director, Martin is presumably an agent of the Department of Correction.

unsuccessful'").

Finally, Gaskins fails to articulate a plausible need for the unidentified documents sought in the request other than a general need to support the claims in the amended complaint. There is no evidence that such documents, if identified and produced, would influence the outcome of the motion for summary judgment filed by Nolan, Mitchell and Martin. See Morrissey v. Boston Five Cents Savings Bank, 54 F.3d 27, 35 (1st Cir. 1995) (strong presumption arises in favor of discovery where *inter alia* party articulates plausible need for discovery and demonstrates that facts are discoverable within reasonable time period which, if adduced, will influence outcome of summary judgment motion); accord Resolution Trust v. North Bridge Association, 22 F.3d 1198, 1203 (1st Cir. 1994).

CONCLUSION

In accordance with the foregoing discussion, this court **RECOMMENDS**²² that the motion to stay (Docket Entry # 19) be **DENIED** and the motions for summary judgment (Docket Entry ## 15 &

²² Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten days of receipt of the Report and Recommendation to which objection is made and the basis for such objection. Any party may respond to another party's objections within ten days after service of the objections. Failure to file objections within the specified time waives the right to appeal the order. United States v. Escoboza Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).

32) be **ALLOWED**.

_____/s/ Marianne B. Bowler
MARIANNE B. BOWLER
United States Magistrate Judge